Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs	)	WC Docket No. 18-89

WRITTEN *EX PARTE* SUBMISSION OF HUAWEI TECHNOLOGIES CO., LTD AND HUAWEI TECHNOLOGIES USA, INC.

Huawei Technologies Co., Ltd. and Huawei Technologies USA, Inc. (collectively, "Huawei"), by their undersigned counsel, submit this *ex parte* presentation to supplement the record in the above-captioned docket.

On December 7, 2018, the Telecommunications Industry Association ("TIA") filed reply comments ("TIA Reply Comments") in response to the public notice issued by the Wireline Competition Bureau on October 26, 2018 (DA 18-1099), seeking comment on the implications, if any, of the enactment of Section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 ("NDAA") on the above-captioned rulemaking. The views expressed by the undisclosed membership of TIA's Public Policy Committee (*see* TIA Reply Comments n.1) are so extreme, and so far afield of the actual provisions of law relevant to the Commission's proceeding, that a brief response is warranted.

I. TIA'S INTERPRETATION OF SECTION 889(b)(1) IS STRAINED AND UNREASONABLE

TIA argues that Section 889 of the NDAA applies to the Commission's Universal Service Fund programs. TIA Reply Comments at 3-16. Its argument is based on rhetoric rather than a straightforward reading of the actual words of the statute.

First, it repeatedly conflates distinct provisions of the NDAA; for example, by arguing that "Section 889 applies to the USF programs" without distinguishing between different paragraphs within that section that contain different terms. *Id*. at 3. Thus, TIA is correct in that one provision of Section 889, namely paragraph (b)(2), undoubtedly *does* apply to the USF; but the relevant question for present purposes is whether paragraph (b)(1) applies to USF, which it does not.

Second, TIA transparently tries to reframe the issue by characterizing any reading of the statute with which it disagrees as "creating a USF exception[.]" *Id.* at 13. No one has advocated interpreting the NDAA to create any "exception"; rather, the comments that TIA challenges sought to apply the NDAA as it is written. This is like arguing that a law that prohibits a right turn on a red light must also apply to yellow lights, to avoid "creating a yellow light exception." This approach ignores the bedrock principle of statutory construction that "[t]he starting point in every case involving construction of a statute is the language itself." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 756 (1975) (Powell, J., concurring)); *see also, e.g., Williams v. Taylor*, 529 U.S. 420, 431 (2000). Because the plain language of section 889(b)(1) does not encompass the USF, none of the interpretive arguments TIA can conjure up are persuasive.

But the most fundamental flaw in TIA's reasoning is that it starts by presuming it knows what Congress *meant* to enact, and then strives to interpret the words of the statute to fit its presumed meaning. As just noted, this turns the process of statutory interpretation on its head; the object is to determine the meaning of the words that Congress actually used, not to fit those words to some external objective. *See, e.g., Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

TIA's specific arguments are no more persuasive than its general themes, as discussed below.

A. USAC is Not a Federal Executive Agency

TIA does not attempt to claim that USAC is a Federal agency, which it plainly is not; but it argues instead that USAC's status is irrelevant because "section 889(b)(1) unquestionably and explicitly applies to the *Commission*, and it is the agency – not USAC – that bears the responsibility of ensuring that USF programs comport with all applicable legal requirements." TIA Reply Comments at 4-5 (emphasis in original). This is wrong in several respects. First, Section 889(b)(1) does *not* explicitly apply to the Commission. Section 889(b)(2) does, but that paragraph plays a very different role in the statutory scheme, as discussed in the following section I.B. Second, there is nothing in Section 889(b)(1) that imposes "legal requirements" on the USF or on any other Commission program. Rather, that provision prohibits the head of an agency from "obligat[ing] or expend[ing] loan or grant funds to procure or obtain, extend or renew a contract to procure or obtain, or enter into a contract … to procure or obtain" certain types of equipment, services, and systems. It does not impose any positive obligation on an agency to modify the terms of any program it administers or regulates; rather, it imposes a negative restraint on specific acts, namely obligating or expending loan or grant funds in certain manners. TIA's argument effectively seeks to rewrite the statute to accomplish something different, and broader, than what Congress specifically directed.

TIA does not seem to dispute the fact that universal service program funds are controlled, obligated, and expended by USAC, rather than by the Commission. Instead, it simply dismisses these inconvenient facts as irrelevant, contending that since USAC administers the program under the direction of the Commission, "in practical terms" it should be treated as if it were subject to

Section 889. TIA Reply Comments at 6. But the Commission cannot pretend that the statute says what TIA wants it to say; it must apply the law as written, and as written it simply has no effect whatsoever on funds expended or obligated by a non-governmental entity.

B. Subsidies are Not a Form of Grants

TIA tries to explain away the difference between the "loans and grants" provision in section 889(b)(1) and the "loan, grant, or subsidy" provision in section 889(b)(2) by claiming that "dictionary definitions" equate the terms "subsidy" and "grant." TIA Reply Comments at 7. However, courts do not rely on general-use dictionaries for the meanings of terms that have a precise technical meaning in the statute's context. *See, e.g., Morissett v. United States*, 342 U.S. 246, 263 (1952) ("where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."); *Hawley v. Diller*, 178 U.S. 476, 487 (1900) (stating that the term "*bona fide* purchaser of land" had a "well-defined meaning … long before the enactment of the statute under consideration, and, under a well-established rule of construction, unless it is apparent that Congress intended it to have a different meaning, it is presumed to have been used in its technical sense"). In this case, the established technical meaning of "grant" could not be clearer – a "grant agreement" "do[es] *not* include an agreement under which … only … a subsidy" "is provided." 31 U.S.C.

§ 6302(2)(B) (emphasis supplied). *See also* 2 C.F.R. § 200.51(c)(2) (same). Moreover, grants are substantially different than subsidies, as explained in Huawei PN Comments at 7-10. Grants typically provide funding for the purchase of particular equipment or for the performance of a particular service. Subsidies, by contrast, provide general assistance to recipients who engage in a targeted business activity. Thus, for example, Connect America Fund recipients do not receive funding for the purchase of specific pieces of equipment, but rather receive support payments designed to subsidize a portion of the overall capital and operating expense of their networks. *See* Angele A. Gilroy and Lennard G. Kruger, Cong. Research Serv., R42524, *Rural Broadband: The Roles of the Rural Utilities Service and the Universal Service Fund* 18 (2012) ("RUS *grants and loans* are used as up-front capital to invest in broadband infrastructure, whereas the USF provides *ongoing subsidies* to keep the operation of … networks … economically viable[.]") (emphasis supplied).

TIA claims that its interpretation is saved by the opening phrase of subsection 889(b)(2), which refers to "implementing the prohibition in paragraph (1)." TIA argues that, because of this phrase, paragraph (b)(2) trumps (b)(1) in case of any inconsistency in the language. TIA Reply Comments at 6. However, as Huawei explained in its comments in response to the Public Notice, there is a more plausible reading of these provisions that does not require twisting the statutory language beyond recognition – paragraph (b)(2) directs the Commission to use USF funds to mitigate the impacts of the prohibition of paragraph (b)(1), but does not modify the scope of that prohibition. *See* Huawei PN Comments at 3-5; Huawei PN Reply Comments at 9-10.

TIA also argues that recognizing a distinction between grants and subsidies would be inconsistent with its understanding of Congressional intent. TIA Reply Comments at 6-7. But, as already noted, this turns the process of statutory interpretation on its head. Any interpretation of a

statute must start with the actual language enacted by Congress, and the language of section 889(b) plainly draws a distinction between loans and grants, in paragraph (1), and loans, grants, and subsidies, in paragraph (2). That distinction must be given meaning in any interpretation of the provision.

Finally, TIA offers the peculiar suggestion that the authors of section 889 did not really know what they were doing. It says that, because these two paragraphs were drafted at different times, and were not reviewed by the Telecommunications Subcommittees of either House, the word "subsidy" should not be treated as a "term of art with special meaning in the communications law context," and the difference in terminology between the two paragraphs should be disregarded. TIA Reply Comments at 7-8. First, however, the object of statutory interpretation is to determine the meaning of the text that Congress enacted, not to read the drafters' minds. "If Congress enacted into law something different from what [the drafters] intended, then it should amend the statute to conform to its intent. It is beyond [the] province [of interpreters] to rescue Congress from [supposed] drafting errors, and to provide for what [they] might think … is the preferred result." *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004). Second, the idea that "subsidy" has meaning only in the context of communications law is untenable. As Huawei showed in its initial comments in response to the Public Notice, the distinction between grants and subsidies is recognized in many areas of the law, not just in the field of communications. Huawei PN Comments at 7-10; Rural Wireless Association Reply Comments at 6-7, n.22. Even the general Federal procurement statute, applicable across all agencies of the Government, expressly distinguishes between the two. 31 U.S.C. § 6302(2)(B).

C. There is No Basis for Interpreting Section 889(b)(1) More Broadly Than Its Plain Language Requires.

TIA suggests that because Congress intended Section 889 to "address national security concerns," TIA Reply Comments at 9, that provision should be read so that its prohibitions apply as broadly as possible. TIA suggests that any other interpretation "makes no sense" because it would not effectuate Congress' desire to protect national security. *Id.* This argument is simplistic. If the only thing Congress was concerned about was eliminating as much "covered equipment" from use in the United States as possible, then it would not have limited the prohibitions in sections 889(a)(1) and 889(b)(1) to covered equipment that is "a substantial or essential component … or … critical technology," nor would it have included two exclusions from the prohibitions in sections 889(a)(2) and 889(b)(3) — instead, it would have prohibited use of *all* covered equipment. The fact that it did not go so far indicates that Section 889, like the vast majority of legislative enactments, sought to strike a compromise among a variety of interests. *See, e.g., Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596, 617 (1981) (Congress necessarily balances conflicting interests in reaching legislative compromises and "the wisest course is to adhere closely to what Congress has written"); *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (the Court "must respect the compromise embodied in the words chosen by Congress").

D. TIA's *Chevron* Deference Argument is Misplaced

TIA argued in its initial comments that the Commission had wide leeway to interpret any (supposedly) "ambiguous" provisions in Section 889. Huawei responded in detail to this point in its Reply Comments, and showed that *Chevron* deference would not apply because Congress did not delegate authority to implement the NDAA to the Commission. Huawei PN Reply Comments at 12-16. In its reply, TIA argues at some length that there is an *implicit* delegation of authority

because the Commission is named in section 889(b)(2), and that the Commission's ancillary jurisdiction provides further authority. TIA Reply Comments at 13-16.

But whatever role the Commission may have specifically to implement the mitigation provisions of section 889(b)(2), there is no fair reading of this paragraph that would implicitly extend the Commission's duties to interpretation of all the other provisions of the section. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) ("Although agency determinations *within the scope of delegated authority* are entitled to deference, it is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction"). The key fact that TIA ignores, and that forecloses both its implicit delegation and ancillary jurisdiction theories, is that Congress has *expressly* delegated the implementation of Section 889, as a Federal procurement statute, only to DOD, GSA, and NASA, and *expressly* foreclosed other agencies from adopting regulations on such matters. *See* Huawei PN Reply Comments at 14. There is simply no gap for the Commission to fill.

II. THE COMMISSION HAS NO INDEPENDENT AUTHORITY TO RESTRICT USF RECIPIENTS' CHOICE OF EQUIPMENT

TIA argues that Section 889 does not limit the Commission from exercising "pre-existing authority under the Communications Act" to restrict the use of USF support. TIA Reply Comments at 18-19. Although it is true that nothing in Section 889 either limits *or expands* the Commission's jurisdiction under the Communications Act, Huawei has already explained at length why the Communications Act does not authorize restrictions on the use of USF support based on national security considerations and unrelated to any of the statutory universal service principles. Huawei NPRM Comments at 12-35; Huawei NPRM Reply Comments at 3-18. Therefore, the "pre-existing authority" on which TIA seeks to rely does not exist.

Indeed, even if the Commission *could* act without regard to the provisions of Section 889, that would not mean it *should* go beyond the limits that Congress imposed on all other Executive

agencies. *Cf.* TIA Reply Comments at 19. As Huawei has previously discussed, it would be arbitrary and capricious for the Commission to adopt a blanket ban on particular suppliers' equipment without considering the factors that led Congress to exclude various categories of equipment from Section 889's prohibitions. Huawei PN Comments at 14-15; Huawei PN Reply Comments at 17-19.

The Commission should also note the recent recommendations of its Communications Security, Reliability and Interoperability Council's Working Group 3 on Network Reliability and Security Risk Reduction, which urge the Commission to shift its focus away from restricting specific suppliers and instead support efforts to improve supply chain security industry-wide:

> **10.5.1 Regulatory Action**
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> The supply chain is a free market driven partnership between numerous companies globally. Restrictions on suppliers in the communication ecosystem, or any industry ecosystem for that matter, can have unintended consequences that need to be fully understood. If the FCC decides that regulatory action on [Supply Chain Risk Management] is necessary based on responses to the current NPRM on restricting use of USF Funds, that regulatory action should be focused as narrowly as possible to avoid broader impacts across the supply chain. The working group recommends the Commission fully consider the ongoing work within the DHS and NIST prior to taking any actions.
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> **10.5.2 Support NIST CSF Update to Supply Chain Procedures**
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> CSRIC recognizes that Supply Chain best practices are well documented by a number of different industry standards bodies – NIST, COBIT, ISO to name a few. CSRIC recommends that the FCC support the NIST collaborative process to define the voluntary procedures and identify the informed references for inclusion in updates to the Cyber Security Framework.[1]

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[1] CSRIC VI, Working Group 3, *Addendum to Final Report – Report on Best Practices and Recommendations to Mitigate Security Risks to Emerging 5G Wireless Networks* (adopted Dec. 18, 2018), available at https://www.fcc.gov/file/14855/download.

Huawei supports these CSRIC recommendations and believes that the only sound approach to addressing supply chain risk is to introduce best practices industry-wide. Continuing to focus on targeting a few specific suppliers while ignoring the interdependent global supply chain on which virtually all equipment manufacturers and suppliers rely would do little or nothing to address the real cybersecurity threat.

III. CONCLUSION

For the foregoing reasons, the Commission should not act as recommended by TIA, but should terminate this rulemaking proceeding in favor of a more comprehensive, holistic approach to supply chain security.

Respectfully submitted,

/s/ Andrew D. Lipman
Andrew D. Lipman
Russell M. Blau
David B. Salmons

MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave, NW
Washington, DC 20004
(202) 739-3000
(202) 739-3001 (Fax)
andrew.lipman@morganlewis.com
russell.blau@morganlewis.com
david.salmons@morganlewis.com

Counsel to Huawei Technologies Co., Ltd. and Huawei Technologies USA, Inc.

Glen D. Nager
Bruce A. Olcott
Ryan J. Watson

JONES DAY
51 Louisiana Ave, NW
Washington, D.C. 20001
(202) 879-3939
(202) 626-1700 (Fax)
gdnager@jonesday.com
bolcott@jonesday.com
rwatson@jonesday.com

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